No. 88-1126

Supreme Court, U.S.
FILED
JAN 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROY L. RYAN
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

---

60 pp

TABLE OF CONTENTS

page

Fifth Circuit Court of Appeals
Opinion dated October 12, 1988...
Appendix A 1

Fifth Circuit Court of Appeals
Order Denying Petition for
Rehearing dated November 9, 1988..
Appendix B 57

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 87-1683

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROY RYAN, TYRELL BARKER,
a/k/a TERRY BARKER, and
LAURENCE B. VINEYARD, JR.,

Defendants-Appellants

Appeal from the United States District Court for the Northern District of Texas
(CR-86-00041-04)

(October 12, 1988)

Before REAVLEY, JOHNSON and JONES, Circuit Judges.

REAVLEY, Circuit Judge:*

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession."

Pursuant to that Rule, the court has determined that this opinion should not be published.

Ryan, Barker, and Vineyard appeal from criminal convictions of conspiracy, making false statements, wire fraud, and misapplication of bank funds. We affirm.

I. Facts

On December 10, 1986, and 18-count superseding indictment was returned in the United States District Court for the Northern District of Texas charging Ryan, Barker, Vineyard and others with conspiring to misapply bank funds, to conceal material facts within the jurisdiction of the Federal Savings and Loan Insurance Corporation ("FSLIC") and the Federal Deposit Insurance Corporation ("FDIC"),to make false statements in a loan application, to make false entries in bank records, and to commit mail and wire fraud, in violation of 18 U.S.C

371 1/ (count 1). Appellants were charged substantively with three counts of making false statements in connection with a loan application, in violation of 18 U.S.C. 1041 2/ and 2 3/

1/ 371 provides as follows:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

2/ 1014 provides as follows:

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Re-construction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmer's Home Corporation, the Secretary of Agriculture acting through the Farmer's Home Administration, any Federal intermediate credit bank, or any division,

officer, or employee thereof, or of any corporation organized under sections 1131-1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owner's Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more that $5,000 or imprisoned not more than two years, or both.

3/ 2 provides as follows:

(a) Whoever commits an offense against the United States or aids, abets,

(counts 4-6), and with twelve counts of mail and wire fraud, in violation of 18 U.S.C. 1341,4/ 1343,5/

---

counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

4/ 1341 provides as follows:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than

and 2(Counts 7-18). Barker and Vineyard were also charged with two counts of misapplying bank funds, in violation of 18 U.S.C. 657[6]/ and 2 (Counts 2-3).

$1,000 or imprisoned not more than five years, or both.

[5]/ 1343 provides as follows:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretense, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[6]/ 657 provides as follows:

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, National Credit Union Administration, Home Owner's Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmer's Home Administration, or any land bank, inter-

Following a jury trial, all three appellants were convicted on three counts of making false statements in connection with a loan application (Counts 4-6) and on two counts of wire fraud (Counts 7 and 13); Barker was convicted on two counts of misapplying bank funds (Counts 2 and 3) and on one count of making false

---

mediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation or by the Administrator of the National Credit Union Administration or any small business investment company, and whoever, being a receiver of such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise instructed to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $1000, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

statements in connection with a loan application (Counts 5 and 6).7/

The evidence presented to the jury during this three week trial was complex -- as might be expected. Sammy Spikes, a prominent west Texas businessman, provided the government's key testimony.

7/ Appellants were sentenced as follows:

Ryan was sentenced to five years' imprisonment on Count 1, two years on Counts 4-6, and three years on Counts 7 and 13, with the sentences on Counts 4-7 and 13 to run concurrently with each other but consecutively to the sentence on Count 1. Ryan was fined $5,000 on Counts 1 and 4 through 6 and $1,000 on Counts 7 and 13 for a total of $22,000.

Barker received a sentence of five years' imprisonment on Count 1 and two years' imprisonment on Counts 2, 3, and 5, with all sentences to be concurrent. Barker was fined $5,000 on each count for a total of $20,000.

Vineyard was sentenced to five years' imprisonment on Count 1 and two years' imprisonment on Counts 2, 3, 5, and 6, with all sentences to run concurrently. In addition, Vineyard was fined $5,000 on each count for a total of $25,000.

The court also ordered Ryan and Vineyard to pay restitution for any financial losses they caused.

Spikes testified that in August of 1983, bank examiners were questioning his sizeable business and personal loans that were outstanding at the Moncor banks in New Mexico. In addition to the Moncor loans, Spikes owed substantial sums of money to appellant Ryan. At the same time, appellants Barker and Vineyard were interested in purchasing Key Savings and Loan Association in Colorado ("Key") but were having trouble finding financing. Appellants and Spikes devised a scheme whereby Barker and Vineyard could purchase Key Savings and Loan and Spikes could repay his debts.

Under this scheme, Moncor officials agreed to lend Barker and Vineyard enough money to buy Key with the understanding that Key would lend Spikes the money both to repay his debts to Moncor and to purchase a tract of ranch land in New Mexico that Ryan had found (and secretly

owned). According to Ryan, this ranch land had an appraised value far exceeding its asking price; therefor, the purchase price upon which any loan was based could be inflated artificially through a series of "land flips." Spikes could use the difference between the real purchase price and the loaned purchase price to repay his debts.

While Moncor was considering their request for financing and as a show of good faith, Barker and Vineyard agreed to transfer immediately one of the loans that concerned Moncor officials to Brownfield Savings and Loan ("Brownfield"), which Barker owned. Shortly thereafter Moncor provided the financing with which Barker and Vineyard purchased Key. Then, in a transaction involving an inflated appraisal, fictitious financial statements, shell corporations, and straw men "borrowers" who concealed Spikes' in-

volvement, Key loaned $4,500,000 to Spikes to finance the New Mexico ranch land. Key actually disbursed $3,800,000 of that amount to Spikes even though Spikes had purchased the property for only $1,590,000. Spikes used the difference to repay his outstanding debts both to Moncor and to Ryan. The loan eventually went into default.

II. Sufficiency of the Evidence

Appellants contend in varying degrees that the evidence was insufficient to support their convictions.8/ Our review of the sufficiency of evidence is limited. We view both the

---

8/ The government asserts that Ryan did not raise sufficiency of the evidence points regarding his wire fraud convictions on Counts 7 and 13. Ryan counters in his reply brief that in fact he does challenge the sufficiency of the evidence supporting those convictions. Whether or not Ryan properly raised the points, we find that the evidence was sufficient to support the convictions based on the same reasoning given herein.

evidence and all inferences reasonably drawn therefrom in the light most favorable to the government and sustain a conviction whenever a reasonable juror could have concluded that the evidence established guilt beyond a reasonable doubt. United states v. Hernandez-Palacios, 838 F.2d 1346, 1348 (5th Cir 1988); United States v. Bell, 678 F.2d 547, 549 (5th Cir Unit B 1982) (en banc), aff'd on other grounds, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983). It is not our province to reweigh the credibility of a witness. United States v. Gardea Carrasco, 830 F.2d 41, 43-44 (5th Cir. 1987). Applying this standard, we conclude that the evidence was sufficient to support the appellants convictions.

A. Conspiracy Convictions

Ryan alleges that the evidence was insufficient to prove that (1) he joined

the conspiracy described in Count 1, and (2) he conspired to make false statements to Brownfield Savings and Loan. Vineyard and Barker, too, argue that the evidence was insufficient to support their conspiracy convictions.

"To sustain a conspiracy conviction, the government must establish that a conspiracy existed, that the accused knew of the conspiracy, and that he knowingly and voluntarily joined it." United Stated v. Osgood, 794 F.2d 1087, 1094 (5th Cir.), cert. denied, 107 S.Ct. 596 (1986). See also United States v. Richardson, 833 F.2d 1147, 1152 (5th Cir. 1987). A jury may infer that a defendant knew of the conspiracy and participated in it from "a `development and collection of circumstances.'" United States v. Marx, 635 F.2d 436, 439 (5th Cir. Unit B 1981) (quoting Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed.

680 (1942)). The government need not prove that the defendant knew of all the details, but instead must show only that he knew of the conspiracy's essential purpose. Osgood, 794 F.2d at 1094; United States v. Davis, 666 F.2d 195, 201 (5th Cir, Unit B. 1982).

The record demonstrates that there was sufficient evidence to show both the existence of the conspiracy and the knowing participation of each appellant in it. From the beginning it was understood that as an inducement to Moncor for financing Barker's and vineyard's acquisition of Key Savings and Loan, appellants would undertake to generate unlawful proceeds to retire Spikes' outstanding loans at Moncor's banks. All three appellants knew that the plan would involve a third party borrower since Spikes could not borrow additional funds himself. Similarly, all three knew that a

"blown-up appraisal" would be used and that the planned "land flip" would eventually leave some "fool" financially "buried."

As a demonstration of good faith, Barker and Vineyard agreed to an immediate transfer of one of Spikes' loans from Moncor to Brownfield savings and Loan. To facilitate that transaction Barker approved two unsecured loans for fictitious purposes a week before the "borrowers" even make application and Vineyard ordered the disbursement of those funds. Additionally, Ryan relayed instructions from Barker and Vineyard to Spikes to set up two shell corporations to handle the "land flip." Ryan then purchased the land to be used in the "flip," had the land appraised at a drastically inflated value, and assisted in the preparation of various fictitious financial statements. Later vineyard

personally presented the Geleta loan package to Key's loan committee without fully disclosing the true nature of the transaction.

Appellants contend that their conspiracy convictions should be reversed because there was no evidence that they knew of or participated in certain transactions which transpired. The evidence amply demonstrates that appellants knew of the conspiracy's essential purpose; therefore, they need not have been aware of or participated in each and every aspect of the conspiracy.

Further, Ryan;s claim that he should have been acquitted since, as alleged in the indictment, he did not agree to the submission of false financial statements at both Key and Brownfield Savings and Loan Associations is without merit. The Supreme Court had determined that "when a jury returns a guilty verdict on an

indictment charging several acts in the conjunctive,. . . the verdict stands if the evidence is sufficient with respect to any one of the acts charges." Turner v. United States, 396 U.S. 398, 420 90 S. Ct. 642, 654, 24 L.Ed.2d 610 (1970). On this basis this court has previously held that when a conspiracy to commit multiple substantive offenses is alleged, a general guilty verdict may properly be sustained if there is sufficient evidence to support any one of the multiple objectives. See United States v. Livingston, 816 F.2d 184, 195 (5th Cir. 1987); United States v. Bruno, 809 F.2d 1097, 1103-04 (5th Cir.), cert. denied, 107 S.Ct. 2198, 95 L.Ed.2d 853 (1987).9/

9/ Ryan further argues that the conspiracy conviction should be overturned because the court instructed (favorably to Ryan) the jurors that if they found that the conspiracy charged did not exist, they must return a not guilty verdict even though they found "that some of the conspiracy existed." This quoted phrase, a typographical error, did appear in the transcribed jury instructions.

B. Misapplication convictions

Both Barker and Vineyard assert that the evidence was insufficient to support their misapplication convictions on Counts 2 and 3. Relying primarily on United States v. Gens, 493 F.2d 216 (1st Cir. 1974) they contend that there was no misapplication of Brownfield's funds since Brooks and Harrison, the nominee borrowers, were financially capable and understood their responsibilities to repay the loans.

To establish a violation of 18 U.S.C. 657, the government must prove,

---

However, the instructions from which the court read properly informed the jury that it should acquit Ryan if it found he participated in "some other conspiracy." In addition, the transcribed instructions included the correct phrase in the sentence immediately following that quoted by Ryan. Furthermore, the court had already properly instructed the jury that the government need only prove a single object of the conspiracy in order to convict. We conclude that the court's instructions did not require the jury to acquit Ryan on the conspiracy count if it found he did not personally participate in the Brownfield transaction.

among other things, that the accused willfully misapplied funds belonging to a financial institution and that he acted with the intent to injure or defraud that institution. See United States v. Farrell, 609 F.2d 816, 818 (5th Cir. 1980). This court has adopted the rule that "the requisite intent is proven by showing a knowing, voluntary act by the defendant, the natural tendency of which may have been to injure the bank even though such may not have been his motive." United States v. Southers, 583 F.2d 1302, 1305 (5th Cir. 1978). A criminal misapplication of funds may be inferred where loans have been made "with a conscious disregard of a substantial and unjustifiable risk of injuring" the lending institution. United State v. Fusaro, 708 F.2d 17, 21 (1st Cir.), cert. denied, 464 U.S. 1007, 104 S.Ct. 524, 78 L.Ed.2d 708 (1983). In other words, "[t]he trier of fact may infer the re-

quired intent, i.e., knowledge, from the defendant's reckless disregard for the interest of the bank." United States v. Adamson, 700 F.2d 953, 965 (5th Cir. Unit B) (en banc), cert denied, 464 U.S. 833, 104 S.Ct. 116, 78 L.Ed.2d 116 (1983).

In Gens, the First Circuit determined that willful misapplication counts fall into three general categories: (1) Those in which bank officials knew the named creditor was either fictitious or wholly unaware that his name was being used; (2) cases in which bank officials knew the named debtor was financially incapable of repaying the loan whose proceeds he passed on to the third party; and (3) cases in which bank officials assured the named debtor, regardless of his financial capabilities, that they would look for repayment only to the third party who actually received the loan proceeds: in other words where the debtor allowed only his name to be used,

enabling the bank officials to grant a de facto loan to a third party to whom the bank was unwilling to grant a formal loan. Gens, 493 F.2d at 221, 222.

Barker and Vineyard attempt to distinguish their situation from those listed above and claim that here, as in Gens, no criminal activity should have been found to exist. They assert that in a situation where the named debtor is financially capable and fully understands his responsibility to repay the money, a loan to him cannot constitute willful misapplication of funds even if the bank officials know he will turn the proceeds over to a third party.

We believe that Gens is inapplicable to the case before us.10/ In so holding

---

10/ We recognize that there is a split in the circuits on the question of whether a bank officer is guilty of a criminal misapplication when he loans funds to a financially capable and responsible nominee borrower with knowledge that the

we note that even the Gens court cautioned that "we do not go so far as to say that the obligation of a financially responsible party to a bank will in all cases mean post-loan transfer to a third party will not result in liability for willful misapplication" and that there may be "special circumstances demonstrating injury or risk of injury to the bank despite the obligation of a financially responsible party to the bank." Gens, 493 F.2d at 222 n.14. In addition, the Fifth Circuit has recognized since Gens that a scheme in which a straw man borrower obtains bank funds for someone who

---

funds ultimately will be channeled to a third party. We find it unnecessary to take sides in this conflict on the facts before us. See United States v. Salinas, 654 F.2d 319, 329 n.10 (5th Cir. Unit A 1981), rev'd on other grounds, United States v. Adamson, 700 F.2d 953 (5th Cir. Unit B.) (en banc), cert. denied, 464 U.S. 833, 104 S.Ct. 116, 78 L.Ed.2d 116 (1983).

cannot himself obtain a formal loan comes within the scope of misapplication of bank funds. United States v. Cyr, 712 F.2d 729, 734 (1st Cir. 1983).

Based on the record before us, we think it is clear that there was no bona fide loan to the straw men, Harrison and Brook, at all. Each of the parties involved knew that Brooks and Harrison were names only and no one, including the lending officials and the "borrowers" themselves, actually expected them to repay the loaned amount.

As evidence of this the government showed that the nominee borrowers were neither willing nor able to repay the loans. Spikes assured both Harrison and Brooks that he would refinance the loans or have the bank's board of directors formally assume the loans in order to relieve them of personal liability. Additionally, Harrison refused to sign

the loan application since he did not consider himself personally responsible for the loan. Even at the time the loans were made, Harrison, doubted his capacity to repay the loan without difficulty and Brooks admitted that he was "having a hard time financially" due to the millions of dollars he already owed.

More important than this evidence, however, are the two special circumstances which establish criminal misapplication in this case. First, the loans were approved under circumstances that created a "substantial and unjustifiable risk" to the savings and loan. Fusaro, 708 F.2d at 21. In August of 1983 both the Moncor banks and Spikes' banks were being audited. Appellants were aware at that time that federal regulators had prohibited their institutions from making further loans to Spikes and that Moncor officials were desperate to transfer a nominee loan

set up by Spikes to another lender. Despite their knowledge, appellants approved loans to the nominee borrowers Spikes suggested before those borrowers were even asked to apply for the loans, see Cyr, 712 F.2d at 733, and before they made any investigation into the borrower's abilities to repay.11/ Moreover, the loan commitment sheets falsely identified the loans' purposes as "working capital" and, despite their size, the loans were unsecured. See United States v. Payne, 750 F.2d 844, 857 (11th Cir. 1985). These factors provide ample evidence from which a jury could have inferred intentional misconduct.

A second special circumstance is the fact that Barker and Vineyard furthered

---

11/ Although Vineyard claims he asked Reed about the borrowers' abilities to repay the loans, his inquiry came after he directed Reed to issue the loans and long after Barker approved them.

their own personal interests in authorizing the loans to Harrison and Brooks. We find that this is at least some evidence of fraud when a straw man borrower is used. See United States v. Austin, 823 F.2d 257, 259 (8th Cir. 1987), cert. denied, 108 S. Ct. 778, 98 L.Ed.2d 864 (1988); United States v. Clark, 765 F.2d 297, 305 (2d Cir, 1985).

The circumstances here strongly suggest that Barker and Vineyard would not have approved the nominee loans to Harrison and Brooks but for their negotiations with Moncor to obtain financing to purchase Key. Newman, a Moncor official, testified at trial that there was no formal squid pro quo, but that Moncor would not have loaned money to Barker and Vineyard if there had been "no chance" of their helping Spikes repay his loans to Moncor. After Barker and Vineyard agreed to transfer the nominee loan immediately,

without waiting on the "land flip" proceeds, Moncor officials only shortly thereafter approved their financing request. From this set of facts a reasonable jury could infer that the nominee loans to Harrison and Brooks were a show of good faith to Moncor officials that Barker and Vineyard would return the favor if their financing request were approved. The evidence supports Barker's and Vineyard's misapplication convictions.

C. False statement convictions

(1) Ryan

Ryan further alleges that the evidence was insufficient to prove his involvement in the creation of false financial statements for Brooks and McCallister, which supported the Key loan for purchase of the Geleta Ranch. Although Ryan does not dispute that the statements that were submitted to Key

were overvalued, he contends that the government failed to prove that Ryan was aware of that fact. To the contrary, and as Ryan readily admits, Ryan told Spikes that Key wanted a higher net worth on the Geleta borrowers' financial statements before it would make the loan. To accomplish this, Ryan suggested that the assets on the financial statements needed to be "bumped up." Ryan later admitted to the FBI that even at the time this was going on he believed Brooks and McCallister were in poor financial condition. The evidence fully supports Ryan's conviction.

(2) Vineyard

Vineyard contends that the evidence was insufficient to support his convictions for aiding and abetting the submission of false statements to Key (Counts 5 and 6) and for violating 18 U.S.C. 1014 (Count 5). He complains that the infor-

mation in the Geleta financial statement (Count 5) was not false, that he lacked knowledge of the falsity of Brook's financial statement (Count 6), and that he was unaware of any criminal conduct at the time he presented the financial statements to Key's loan committee.

The evidence sufficiently demonstrated Vineyard's participation in the charged conspiracy. Under Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180 90 L.Ed. 1489 (1946), the jury could find on that basis that Vineyard was liable for the substantive offenses he co-conspirators committed in furtherance of that conspiracy. The evidence supports Vineyard's convictions on Counts 5 and 6.

Regarding the false financial statement charge set out in Count 5, Vineyard, as well as all other participants, knew that Geleta Ranch, Inc. was a shell

corporation without any assets set up at his and Barker's direction to accommodate the "land flip" scheme. The financial statement listing Geleta's assets in excess of $7,000,000 was therefor patently inaccurate. Further, whether or not the financial institution relied on the statement in making its loan decision is insignificant. "[T]he essence of a 1014 offense is the making of the false statement with the intent to influence the lender, and it is not dependent upon the accomplishment of that purpose. . . . It is a crime . . . requiring neither reliance by the bank officers nor an actual defrauding." United States v. Shaid, 730 F.2d 225, 232 (5th Cir.) (citations omitted), cert. denied, 469 U.S. 844, 105 S.Ct. 151, 83 L.Ed.2d 89 (1984).

Furthermore, the evidence was sufficient to support Vineyard's conviction on

Count 6. Vineyard argues that he was neither aware of Brook's financial condition nor present when Brook's financial statement was being altered and that on this basis his conviction on Count 6 should be reversed. However, as the record shows and as Vineyard admits, he did personally direct the issuance of the $165,000 nominee loan to Brooks. Despite his awareness of that substantial liability, Vineyard failed to notify Key's loan committee that the nominee loan was omitted from Brook's financial statement. This evidence, coupled with other evidence of Vineyard's involvement in the scheme to defraud the two savings and loans, fully supports the jury's finding of Vineyard's criminal intent to aid and abet the submission of a false financial statement.

(3) Barker

While Barker does not directly

challenge the sufficiency of the evidence supporting his false financial statement conviction (count 5), he does maintain that that conviction should be reversed due to the jury's inconsistent verdicts of acquittal on the interrelated false financial statement offense charged in Count 4 and the scheme to defraud by use of the mails alleged in Count 7.12/

As a general rule, inconsistent verdicts do not afford a basis for attacking the validity of a conviction. United States v. Powell, 469 U.S. 57, 105

12/ Count 4 charged Barker, co-owner of Key, with aiding and abetting Bobby McCallister in the creation of a false personal financial statement in connection with the $4.7 million loan from Key. Count 5 alleged that Barker assisted in the making of a false commercial financial statement of Galeta Ranch in connection with the same loan. Count 7 charged Barker with aiding and abetting the wire fraud perpetrated in connection with the general scheme, part of which included the making of those same two financial statements.

S.Ct. 471, 83 L.Ed. 2d 461 (1984); United States v. Gordon, 780 F.2d 1165, 1176 (5th Cir. 1986). Such inconsistencies are commonly the result of "mistake, compromise, or lenity." Powell, 469 U.S. at 65. Barker urges us, however, to follow other circuits that have carved out exceptions to the general rule in cases where the offenses are particularly interrelated. He cites as examples United States v. Hannah, 584 F.2d 27 (3rd Cir. 1978) and United States v. Brooks, 703 F.2d 1273 (11th Cir. 1983).13/

This court has never deviated from the general rule as it is articulated in Powell, 469 U.S. at 67. The evidence here was sufficient to link Barker to the charged conspiracy. Therefore, under the

---

13/ Both of these cases were decided before Powell, in which the Court criticized cases such as these that attempt to circumvent the inconsistent verdict rule. Powell, 469 U.S. at 61-62, 63-64.

court's instructions, the jury was free to find Barker guilty of the false financial statement offense charged in Count 5 which his co-conspirators committed in furtherance of the conspiracy. See Pinkerton, 328 U.S. at 645-48; United States v. Michel, 588 F.2d 986, 999 (5th Cir.), cert. denied, 444 U.S. 825, 100 S.Ct. 47, 62 L.Ed.2d 32 (1979).

III. Variance between indictment and proof

Ryan argues that his convictions should be reversed because there was a fatal variance between the indictment and the proof of trial. See Salinas, 654 F.2d at 324-25. Specifically, the indictment charged that Ryan joined a conspiracy that commenced on June 1, 1983, and that he committed successive overt acts to further the conspiracy. At trial the prosecutor stated that the conspiracy started "around the 25th of

August, 1983." Such a variance is not fatal in this case.

The proof at trial is not expected to duplicate the charges contained in an indictment. See United States v. Heimann, 705 F.2d 662, 666 (2d Cir. 1983). A variance between charges and proof is prejudicial only if it "effectively alter[s] the charged terms of the indictment." United States v. Cusmano, 659 F.2d 714, 719 (6th Cir. 1981), cert. denied, 467 U.S. 1252, 104 S.Ct. 3536, 82 L.Ed.2d 841 (1984). If the variance does not change the government's basic theory of the case, unfairly surprise the defendant, or create a risk that the defendant might be prosecuted twice for the same offense, a defendant's substantial rights are not affected. See United States v. Miller, 471 U.S. 130, 134-35, 105 S.Ct. 1811, 1814, 85 L.Ed.2d 99 (1985); United States v. Massey, 827 F.2d 995, 1003-04 (5th

Cir. 1987).

Here, Ryan does not contend that the indictment failed to charge the offense for which he was convicted; instead, he complains that the indictment charged more than was necessary. As the Court made clear in Miller, this does not warrant invalidating the conviction. Miller, 471 U.S. at 140. Rather, the appropriate remedy is to ignore that part of the indictment that is unnecessary in proving the offense. Id. at 136.

In a conspiracy prosecution, the government need not prove the exact point in time at which the conspiracy began. See United States v. Cina, 699 F.2d 853, 859 (7th Cir.), cert. denied, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983). No matter when this conspiracy actually began, the evidence shows that the government proved the same conspiracy that was alleged in the indictment and

that Ryan voluntarily participated in that conspiracy.

Ryan further asserts that he was prejudiced by the court's failure to redact certain overt acts from the indictment before it was submitted to the jury.14/ In particular, Ryan points to

---

14/ Appellants admit that throughout the trial the district court conscientiously attempted to determine the point in time at which the conspiracy actually began. Prior to the trial the following conversation took place regarding striking certain overt acts from the indictment:

The Court: Do I need to strike it right now?

Mr. Gibson: I am not saying that you need to strike it right now. I just want it on record so when we get to instruction time and the presentation of the indictment, we won't get in a bind.

The Court: We will probably at that time delete it from the indictment. I am intending to give a copy of this indictment to the jury, along with the instructions, because I don't see how they are going to understand this thing, anyway, without something to guide them, and we can take it out at that time. But be sure and call my attention to it.

At the time the charge and the court's instructions to the jury were being prepared, appellants neither reminded the court of this conversation

eleven overt acts that should have been redacted to conform to the government's proof that the conspiracy began in the latter part of August. The government concedes that those acts should have been stricken, yet disagrees on the issue of prejudice to Ryan. We find that Ryan was not prejudiced by their inclusion in the indictment.

Ryan, relying on Fed. R. Evid. 404(b), argues that he was prejudiced by the introduction of evidence regarding the extraneous overt acts. Although he acknowledges that the prosecutor advised the court that the evidence of these acts was relevant to show the background and relationship between Spikes and the

---

that had occurred some three weeks before nor objected to the inclusion of the overt acts in the indictment. While we have serious reservations regarding whether Ryan has preserved this issue for appeal, we will address briefly the merits of his argument.

appellants, Ryan claims that the prosecutor later "shifted the grounds for admission and offered the evidence to show `motive, intent' and knowledge." Ryan bases this claim on one brief bench conference that took place during the trial:

> The Court: What is your purpose in introducing this?
>
> Mr. McRoberts: To show where the money went,to show the relationship between these individuals, that Mr. Ryan was -- to show intent, motive, that he had acted as, and knew --
>
> The Court: When was this done?
>
> Mr. McRoberts: June of 1983.

Ryan asserts that because the prosecutor used the words "motive" and "intent," Fed. R. Evid. 404(b) must govern the admissibility question and therefore the court was duty bound to instruct the jury on how to receive the evidence.

We first note that nowhere in the record does it appear that Ryan or any

other appellant requested such an instruction. Second, even if the pre-August 25 loans were not illegal and did not constitute prior bad acts, they were relevant to show the background of the charged conspiracy and therefore admissible. The loans showed the lending relationships between the parties and revealed the extent of Spikes' indebtedness that led to the "land flip" scheme. See United States v. Pepe, 747 F.2d 632, 671-72 (11th Cir. 1984); United States v. McDaniel, 574 F.2d 1224, 1227 (5th Cir. 1978), cert. denied, 441 U.S. 952, 99 S.Ct. 2181, 60 L.Ed.2d 1057 (1979).

Third, the record shows that the jury did not rely on these overt acts in finding appellants guilty on the conspiracy count. Ryan was convicted on five substantive offenses, each of which was listed as an alleged overt act and each of which occurred after the com-

mencement of the conspiracy. See United States v. Saenz, 747 F.2d 930, 937 (5th Cir. 1984), cert. denied, 473 U.S. 906, 105 S.Ct. 3531, 87 L.Ed.2d 655 (1985). Since acts occurring outside the scope of the proved conspiracy did not form the basis for Ryan's conspiracy conviction, he was not prejudiced by their inclusion in the indictment.

IV. Duplicitous joinder of two offenses

Ryan next alleges that Count 1 of the indictment was fatally duplicitous in that it charged two separate offenses: one conspiracy to defraud Brownfield Savings and Loan and another to defraud Key Savings and Loan. By failing to challenge this alleged duplicity before trial, Ryan failed to preserve the issue for appeal.15/ See United States v.

15/ Ryan asserts in his reply brief that he did object on this ground before trial. The record shows, however, that Barker's attorney is the one who in fact

Lyons, 703 F.2d 815, 821 (5th Cir. 1983); Fed. R. Crim. P. 12(b) (2) and (f). His attempt to avoid this problem by arguing that a misjoinder of defendants is inherently prejudicial is foreclosed by United States v. Lane, 474 U.S. 438, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986), in which the Supreme Court rejected the notion that misjoinder is inherently prejudicial. To constitute reversible error, a misjoinder must result in actual prejudice to an accused's substantial rights. Id. 474 U.S. at 449. Ryan has shown no such actual prejudice.

In any event, the face of the indictment alleges that all of the

---

raised the issue. Ryan's attorney neither adopted Barker's comments nor made an independent objection. In addition, Ryan's attorney did not specifically request an instruction on a multiple conspiracy theory at any time during the trial. See United States v. Erwin, 793 F.2d 656, 662 d(5th Cir.), cert. denied, 107 S.Ct. 589, 93 L.Ed.2d 590 (1986).

substantive criminal offenses were part of one conspiracy to defraud Key and Brownfield Savings and Loans in order to repay Spike's debts to Moncor. See United States v. Bruun, 809 f.2d 397, 406 (7th Cir. 1987). Nor were multiple conspiracies proven at trial. The evidence established that one common goal existed and that overlapping participants worked to carry out that goal of defrauding the two savings and loan associations. See United States v. Richardson, 833 F.2d 1147, 1153 (5th Cir. 1987).

V. Jury Instructions

Each of the appellants challenges the jury instructions on varying grounds.

A. One conspiracy with multiple objects

Barker contends that the court erroneously instructed the jury in regard to Count 1, which alleged that Barker was part of one conspiracy to violate seven statutes. Barker asserts that a

violation of one of the listed statutes, 18 U.S.C. 657, is merely a misdemeanor and that a lesser sentence is warranted if the jury found Barker guilty of violating that statute alone. Barker admits that as a general rule reversal is not required by a court's failure to instruct the jury to respond to each specific object in a conspiracy, see United States v. Santana, 503 F.2d 710, 715 (2d Cir.), cert. denied, 419 U.S. 1053, 95 S.Ct. 632, 42 L.Ed.2d 649 (1974), yet claims his rights were substantially prejudiced in this case, mandating reversal. As proof of this prejudice, Barker points out that 18 U.S.C. 657 may constitute a misdemeanor offense, in which case, under 18 U.S.C. 371, the punishment for conspiring to commit that offense could not exceed the maximum punishment provided for that

offense. Therefore, Barker continues, if the jury's verdict regarding Count 1 of the indictment reflected a misdemeanor conviction only, then a trial court's sentence may have been impermissible. Barker concludes that this uncertainty and the potentially illegal sentence substantially prejudiced his rights.

Although the government failed to address Barker's argument directly, it did correctly point out in another section of its brief that 18 U.S.C. 657 creates misdemeanor liability only if the misapplication of funds involved less than one hundred dollars. Because the misapplications that were the objects of the charged conspiracy were considerably in excess of that amount, we find Barker's argument to be without merit.

B. Unanimity necessary as to one object offense

The trial court instructed the

jury that the conspiracy included six separate substantive offenses and that the jury could return a guilty verdict upon finding that a defendant conspired as to only one offense, if the jury unanimously agreed on that offense. Vineyard alleges that this instruction, by allowing the return of a general verdict, deprived him of his right to a unanimous verdict. He asserts that his conspiracy conviction must be reversed in any one of the object offenses is found to be legally insufficient since the jury could have based its guilty verdict on an insufficient ground.

This counrt has held that a guilty verdict will be sustained where there is sufficient evidence to support any one of the multiple offenses in a conspiracy count. See United States v. Liningston,

816 F.2d 184, 195 (5th Cir. 1987). Here the evidence was clearly sufficient to meet this test.

C. Refusal to submit a Gens instruction

Vineyard argues that the court erred in refusing to instruct the jury that a person is not liable under 18 U.S.C. 657 for misapplication of funds if he believed the named borrowers to be financially capable of repaying the loan, even though he knew the funds were going to a third party. This requested instruction was based on the Gens rationale discussed under II. We have already determined that this case did not present a Gens situation; therefore, we find that the trial court properly refused to submit the requested instruction.

D. Elements of wire fraud

Ryan protests that the court's instruction regarding wire fraud was erroneous under McNally v. United States,

107 S.Ct. 2875, 97 L.Ed.2d 292 (1987).16/ Specifically, Ryan contends that the instruction permitted a guilty verdict without the showing of a property deprivation required by McNally. McNally, which held that a scheme to defraud citizens of their intangible rights to honest government was not punishable as mail fraud, is not properly invoked in this case. The court's instructions unambiguously referenced the scheme to defraud the savings and loans of money and property and made clear that the jury could convict only upon finding that the scheme to defraud involved a deprivation

---

16/ The court instructed the jury as follows:

> To act with intent to defraud means to act knowingly with specific intent to deceive someone, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to oneself.

of property.17/ In light of these instructions, we find Ryan's argument to be without merit.

E. Instructions regarding 657 elements

The trial court instructed the jury on the conspiracy count that the elements of the six object offenses would be set forth in that part of the charge which addressed the substantive offenses. In addition, the court pointed out that Ryan was not charged in the 657 misapplication of funds counts. Ryan argues that this was an ambiguous instruction that

---

17/ The court instructed that, in order to convict, it must find that Ryan "devised a scheme to defraud or for obtaining money or property," defining a "scheme to defraud" as "any plan or course of action intending to deceive others and to obtain by false or fraudulent pretenses, representations, or promises, money or property from persons so deceived." The court further instructed that the scheme to defraud must be "substantially the same . . . one alleged in the indictment." The indictment described the scheme as one "to obtain money and property from Key Savings and Loan."

confused the jurors by suggesting that they ignore the first instruction given when considering Ryan's guilt on Count 1. By failing to object to this portion of the charge, Ryan failed to preserve the issue for appeal.

VI. Pinkerton conviction

Both Ryan and Vineyard assert that if this court reverses their conspiracy convictions then the convictions on the substantive offense counts must also be reversed. They based this claim on the fact that the jury was instructed under United States v. Pinkerton, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), which provided that a defendant may be convicted for substantive offenses committed by his co-conspirators even if he did not participate in them. Because we have affirmed the conspiracy convictions in this case, we need not address this issue.

VII. Speedy trial claim

Vineyard claims, without supporting argument, that he was denied his right to a speedy trial by the trial court's granting of a co-defendant's motion for continuance over his objection. Vineyard was arraigned on July 10, 1986. On September 10, 1986, the trial court granted the motion for continuance at the request of several co-defendants and due to the complexity of the case an the existing pretrial motions that needed to be resolved. The district court's action was proper. By its express terms the Speedy Trial Act excludes from its time limitations delays that are attributable to the actions of co-defendants (18 U.S.C. 3161(h) (7)), the disposition of pretrial motions (18 U.S.C. 3161(h) (1) (F)), and the designation of a case as "unusual" or "complex" (18 U.S.C. 3161(h)

(8)(B)(ii)). All three factors were present here.

Further, as a general rule, a "time exclusion that applies to one defendant is applicable to all co-defendants." See United States v. Zielie, 734 F.2d 1447, 1454 (11th Cir. 1984), cert. denied, 469 U.S. 1189, 105 S.Ct. 957, 83 L.Ed.2d 964 (1985). Nor has Vineyard established that he was substantially prejudiced by the delay. We find his argument to be without merit.

VIII. Severance claim

Vineyard next protests, without elaboration, the trial court's denial of his motion for severance. Under United States v. Wheeler, 802 F.2d 778, 781-82 (5th Cir. 1986), cert. denied, 107 S.Ct. 1354, 94 L.Ed.2d 524 (1987), Vineyard must demonstrate a "compelling prejudice" in order to establish that the court abused its discretion in denying his

motion for severance. Because he made no such showing, his claim necessarily fails.

IX. Presentence report

Vineyard also alleges that the trial court erred in failing to conduct a hearing to make findings regarding disputed statements in the presentence report. In particular Vineyard asserts that the statement concerning the amount of Key's loss was inaccurate since, as the owner of nearly all of Key's stock, he himself incurred the vast proportion of the loss.

Fed. R. Crim. P. 32(c)(3)(D) provides that when a criminal defendant "allege[s] any factual inaccuracy in the presentence investigation report or the summary of the report . . . the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such

finding is necessary because the matter controverted will not be taken into account in sentencing." Here the trial judge fulfilled his obligation by expressly disregarding the statements in the presentence report concerning both the identity of the victim and the amount of the loss in imposing sentence. He was not otherwise required to make findings regarding alleged inaccuracies. See United States v. Navaro, 774 F.2d 565, 566 (2d Cir. 1985).

X. Propriety of the sentences

Finally, both Ryan and Vineyard assert that their five-year sentences for conspiracy violate due process. They argue that one of the object offenses, making a false statement in a loan application (18 U.S.C. 1014), provides for a maximum sentence not to exceed two

years.18/

The general conspiracy statute, 18 U.S.C. 371, provides that anyone convicted of conspiring to commit a felony offense "shall be . . . imprisoned not more than five years . . . ." Only in situations in which the underlying offense is a misdemeanor is "the punishment for such conspiracy . . . the maximum punishment for such misdemeanor." While Ryan and Vineyard apparently concede that a violation of 1014 is a felony, they argue that the 371 limitation shows the intent of Congress that the punishment for conspiracy not exceed that for the object offense.

It is well settled that "a sentence imposed . . . within statutory limits is

---

18/ Vineyard also raises the claim that 18 U.S.C. 657 provides for misdemeanor liability in certain circumstances. We addressed this argument under V., A. and found it to be without merit.

generally not subject to review." United States v. Tucker, 404 U.S. 443, 447, 92 S.Ct. 589, 591, 30 L.Ed.2d 592 (1972). In addition, a conspiracy is a separate crime which merits separate punishment; that punishment can be even more severe than the punishment for the completed substantive offense. Iannelli v. United States, 420 U.S. 770, 777-78, 95 S.Ct. 1284, 1289-90, 43 L.Ed.2d 616 (1975). There is no question but that Ryan's and Vineyard's sentences are within the statutory limits imposed by 18 U.S.C. 371. We therefore find their arguments to be meritless.

The judgement of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 87-1683

UNITED STATES OF AMERICA

Plaintiff-Appellee

versus

ROY RYAN,

Defendant-Appellant

Appeal from the United States District Court for the Northern District of Texas

---

ON PETITION FOR REHEARING

(November 9, 1988)

Before REAVLEY, JOHNSON, and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

THOMAS M. REAVLEY
United States Circuit Judge